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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

KIRAN RAWAT, as Trustee, etc., Plaintiff and Appellant, v. ROBERT NEWTON et al., Defendants and Respondents.	C059897 (Super. Ct. No. 06AS03195)

This is an action for breach of contract and fraud involving the purchase of four parcels of real property in south Sacramento. Defendant sellers obtained summary judgment on the grounds of standing, res judicata, and statute of limitations.

We conclude that plaintiff Krishna Living Trust (the Trust), which was deeded the property in the purchase and which paid off a substantial promissory note for it, has standing to maintain this action.[1] We also conclude that res judicata does

[1] See footnote 2, *post*.

not apply and that the Trust satisfies the statute of limitations. Consequently, we shall reverse the judgment.

The Trust had also moved to amend its complaint, which the trial court denied in light of the summary judgment ruling. Accordingly, we shall also reverse the order denying plaintiff leave to file its first amended complaint.

FACTUAL AND PROCEDURAL BACKGROUND

On September 26, 2001, Raghvendra ("Ron") Singh executed a written "Land Purchase Agreement" (the Agreement) with defendants Robert Newton and Houston Tuel, the owners of defendant Coburg Properties (collectively, defendants), to buy four parcels of real property (the property) for $275,000. The property comprises seven-plus acres at the corner of 65th Expressway and Elder Creek Road in south Sacramento. Under the Agreement, defendants were to provide "all the reports and writings in their possession, and all information they possess related to Subject Property at the time of closing."

Singh and his wife, Kiran Rawat, as trustees, created the Trust on October 15, 2001.

Two weeks after the Trust was created, on October 29, 2001, the Agreement was modified to provide, among other things, that defendants would provide "all the disclosures including the physical boundary of the property to Buyer [Singh]." The property was known to partly encompass a former landfill. As defendant Tuel explained in his deposition, he "told [Singh] you

couldn't build on the dump site, but the rest of the land was buildable."

The terms of the $275,000 purchase were $100,000 down, with the balance covered by a promissory note, due December 31, 2003, and secured by the property. As part of the purchase process, the Trust signed a promissory note to defendant Coburg Properties for the balance of the purchase price; and Coburg deeded the property to the Trust.[2] In 2004, defendant Coburg issued a deed of reconveyance to the Trust.

Three complaints--filed in 2002, 2005, and 2006--are involved in this matter:

First, in August 2002, Singh, acting in pro. per., sued defendants Newton and Tuel (in individual pleadings) for breach of contract, alleging they were to "provide all the disclosures about [the property] by December, 2001," and they did not do so "to the satisfaction of [Singh]." In December 2003, Singh dismissed these two complaints with prejudice, pursuant to stipulations with Newton and Tuel.

Second, in August 2005, Singh, now represented by counsel, sued Newton and Tuel again, this time for breach of contract and

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[2] We recognize that a trust is technically not a legal entity, but may act only through its trustee. (*O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1062; Code Civ. Proc., § 369, subd. (a)(2) [undesignated statutory references are to this code]; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 2:6, p. 2-2 (Weil & Brown).) When we use the term "the Trust" in this opinion, we do so for the sake of simplicity, keeping this legal recognition in mind.

fraud. Singh alleged that Newton and Tuel disclosed--pursuant to the Agreement's disclosure provision--the area of the property, the area of the dump on the property, and that the structures on the property were legal. Singh further alleged that, in September 2004, he discovered these disclosures were untrue, rendering the property useless. Finally, Singh alleged that he had filed the 2002 lawsuits against Newton and Tuel for not disclosing all the facts about the property, and that defendants promised in 2004 to settle if he dismissed the 2002 complaint; he did so but they did not settle.

And, third, in July 2006, Rawat, as trustee for the Trust, filed a complaint against defendants Newton, Tuel and Coburg Properties. This is the complaint at issue in this summary judgment appeal. This complaint reiterates the allegations of the 2005 complaint for breach of contract and fraud (now including negligent misrepresentation), but adds details of the fraud discovery, the extent of the dump, and the environmental restrictions on the property. Four months after the 2006 complaint was filed, the 2005 complaint was dismissed for failure to comply with case management program guidelines.

Defendants moved successfully for summary judgment on the 2006 complaint. The trial court ruled that since neither Rawat nor the Trust was mentioned in the Agreement, they lacked standing to maintain the 2006 lawsuit. The trial court also found that the 2005 complaint contained an admission that the claims raised therein were first raised in the 2002 complaint,

which had been dismissed with prejudice; this meant that, since Singh had alleged the same known facts in 2002, the doctrine of res judicata and the applicable statutes of limitations (two years for negligent misrepresentation; three years for fraud) barred the 2006 complaint.

In conjunction with the summary judgment proceeding, the Trust moved to file a substantively similar first amended complaint. The trial court denied this motion in light of its summary judgment ruling.

DISCUSSION

In this summary judgment appeal, the issues are standing, res judicata, statute of limitations, and the denial of leave to file the first amended complaint. We will discuss each in turn.

We uphold a summary judgment if all the evidentiary papers associated with it, which we review independently, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We do not resolve factual issues but ascertain whether there are any to resolve. (§ 437c, subd. (c); *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1305 (*Colores*); *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475.)

Because a summary judgment denies the losing party its day in court, we liberally construe the evidence in support of that party and resolve doubts concerning the evidence in that party's favor. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004)

32 Cal.4th 1138, 1142; *Colores*, *supra*, 105 Cal.App.4th at p. 1305.)

I. The Trust Has Standing

Essentially, the requirement of standing is the requirement that the plaintiff be the "real party in interest" with respect to the claim sued upon. This requirement ensures that the claim will be presented adequately, once and for all. (§ 367; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1003-1004, & fn. 2; *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1001; see Weil & Brown, *supra*, ¶¶ 2:1-2:2, pp. 2-1 to 2-2.) The person who owns or holds title to the claim or the property at issue has standing. (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566; Weil & Brown, *supra*, ¶ 2:2, p. 2-2.)

Here, it is true that Singh, individually (or at least not mentioning the Trust), entered into the Agreement and its modification, and was the plaintiff for the 2002 and 2005 complaints. But the Trust, with Singh and Rawat as its trustees, was created before the Agreement was modified. The Trust paid for the property, or a substantial portion of the purchase price. And the Trust was deeded the property upon close of escrow, and also pursuant to a deed of reconveyance after paying off the balance of the purchase price through a note that named the Trust as payor. Under these facts, the Trust, with Rawat as trustee (and supported, as here, by Singh), has standing to maintain the 2006 lawsuit.

That said, the purpose of the standing requirement is to save a defendant, against whom a judgment may be obtained, from being sued by some other claimant on the same demand. (*Giselman v. Starr* (1895) 106 Cal. 651, 657; see Weil & Brown, *supra*, ¶ 2:4, p. 2-2.) Thus, the claim here is now in the hands of the Trust (through its trustees). Neither Singh nor Rawat, individually, nor any other party, may maintain this claim hereafter.

II. Res Judicata Does Not Apply

The doctrine of res judicata (collateral estoppel) bars a party from litigating anew a cause of action (an issue) that the party previously litigated to finality on the merits. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813.)

The trial court invoked this doctrine against the Trust by finding that the 2005 complaint "contain[ed] an admission that the claims raised therein were first raised in the 2002 lawsuit," and that since the claims in the 2005 complaint were identical to the claims in the 2006 complaint, the 2006 complaint was barred by the dismissal (with prejudice) of the 2002 complaint. (Citing *Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1085-1086 [dismissal with prejudice is a judgment on the merits that bars a subsequent lawsuit on the same claims].)

Interestingly, defendants disclaimed this doctrine in their summary judgment points and authorities, stating: "Defendants do not argue that [the 2002 and 2005 complaints] constitute

collateral estoppel as against plaintiff, for the reason that the [2002] action[] did not contain the same allegations as the present [2006] action[;] and [the 2005 complaint], which did contain the same allegations, was dismissed for lack of prosecution and not adjudicated on the merits." (Recall, the 2006 complaint was filed some four months before the 2005 complaint was dismissed for failure to comply with case management program guidelines.)

In examining the purported judicial admission underlying the trial court's finding of res judicata, we must examine the 2005 and 2002 complaints. The two pertinent allegations in the 2005 complaint state:

(1) "On October 29, 2001, [the Agreement] was modified . . . to include a clause of disclosing any and everything about [the property] to plaintiff. Defendants disclosed the following: first, the area of the [property]; second, the area of the dump on the [property]; and[,] third, [the legality of] the structures on the [property]. In 2002, plaintiff filed a lawsuit against defendants for not disclosing all the facts about [the property]. In 2004, [d]efendants promised plaintiff to have a settlement if plaintiff dismissed that lawsuit."

(2) "In September 2004, plaintiff discovered the following: first, the area of [the property] is smaller than . . . disclosed by defendants; second, the structures on [the property] are illegal; third, [the property] [is] useless; and[,] fourth, the area of the dump is much larger than . . .

disclosed by defendants. In 2004, defendants refused to have a settlement after plaintiff dismissed the [2002] lawsuit for not disclosing all the facts."

The relevant allegations in the 2002 complaint state:

"[Defendants] [were to] provide all the disclosures about [the property] by December, 2001. If all the disclosures [were] not provided to Ron Singh upto [*sic*] the satisfaction of Ron Singh, [defendants] w[ould] pay Ron Singh [liquidated damages]. [¶] [Defendants] did not provide all the disclosures about the real property up to [*sic*] the satisfaction of Ron Singh."

A judicial admission is not binding if it is made improvidently, or unguardedly, or if it is in any way ambiguous. (*Irwin v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 709, 714.)

The Trust argues, contrary to the trial court's finding of admission in the 2005 complaint, that the 2002 complaint alleged simply that defendants failed to provide property information and disclosures as required by the disclosure provisions of the Agreement and its modification, while the 2005 complaint alleged that defendants fraudulently provided and concealed the information and disclosures in a misleading manner.

The allegations quoted above from the 2002 and the 2005 complaints can be read in the manner argued for by the Trust. Also, the 2002 complaint was strictly for breach of contract while the 2005 complaint was for breach of contract *and* fraud.

In light of these distinctions in the substantive allegations of the 2002 and 2005 complaints, the 2002 complaint, as a matter of law, cannot foreclose the 2005 complaint (and in turn the 2006 complaint) on the ground of res judicata.

III. The Statute of Limitations Has Been Met

In granting summary judgment on the fraud and negligent misrepresentation counts, the trial court again used the purported admission in the 2005 complaint, reasoning that "the admission in the 2005 complaint that it is based on the same claims asserted in the 2002 lawsuit shows that Ron Singh had notice of the acreage and environmental problems no later than [August 16,] 2002 [the date the 2002 complaint was filed]"; "[t]hus, plaintiff's claims [of 2006] are barred by the respective statutes of limitations, two years for negligence [negligent misrepresentation] and three years for fraud . . . ."[3]

In considering this issue, we must first determine the statute(s) of limitations that apply. This requires us to determine the nature (i.e., the gravamen) of the Trust's cause(s) of action. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316 (*E-Fab*).)

In the 2005 complaint, and its substantive twin, the 2006 complaint, Singh and the Trust, respectively, sued defendants for breach of contract, negligent misrepresentation and fraud.

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[3] As we shall see in part IV. of the Discussion, *post*, the Trust has dropped any claim regarding the represented acreage of the property.

The gravamen of this lawsuit is that defendants misrepresented that the property was buildable and misrepresented and/or concealed the extent of the dump and the consequent restrictions on development.

The statute of limitations for fraud applies here because this lawsuit is based on facts of fraud rather than on facts of negligence or on facts of mere contract breach (the alleged mere failure to disclose property information as called for by the contract, as opposed to fraudulently disclosing information, was dismissed with prejudice in the 2002 complaint). (See *E-Fab*, *supra*, 153 Cal.App.4th at pp. 1316-1317; see also *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1155; *Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 78 [when one party commits a fraud during the formation or performance of a contract, the injured party may recover in contract and tort].)

Section 338 specifies a three-year statute of limitations for fraud, and adds: "The cause of action . . . is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud . . . ." (§ 338, subd. (d).) Under this discovery rule, as interpreted by case law, the statute of limitations begins to run when a plaintiff has adequate information such that a reasonable person would have inquired about a possible cause of action (termed, inquiry notice)--i.e., when the plaintiff has reason to suspect injury

and some wrongful cause. (*E-Fab*, *supra*, 153 Cal.App.4th at pp. 1318-1319.)

The parties submitted conflicting evidence as to when the Trust "discovered" the alleged wrongful conduct to trigger the running of the statutes of limitations.

The Trust maintained that it did not have sufficient information for discovery purposes until the California Integrated Waste Management Board assessed the property in 2004, with the Board concluding that either all or a substantial portion of the property was not buildable because the property constituted an environmental hazard subject to governmental restrictions.

Defendants countered that the Trust indisputably had inquiry notice (i.e., discovered) no later than January 14, 2003, based on two factors: (1) the allegation in the 2002 complaint that defendants failed to provide satisfactory property disclosures; and (2) a meeting that Ron Singh/the Trust, among other property owners, attended with state and local environmental enforcement agencies on January 14, 2003. At this meeting, the local enforcement agency (LEA) for the state Integrated Waste Management Board informed the attendees that the site (which includes the property) was a low priority one regarding known environmental threats; that the site had been annually inspected to ensure no building and no land use changes; that the perimeter fencing did not accurately reflect the size of the landfill, which was unknown without a more

extensive investigation; and that building within 1,000 feet of the landfill had to be LEA-approved.

Defendants argued that the fraud-based causes of action were untimely because the 2006 complaint was filed on July 26, 2006, more than three years after this inquiry notice-trigger date of January 14, 2003.

As noted, we have characterized the 2006 complaint as the "substantive twin" of the 2005 complaint. This raises the question whether the 2005 complaint is the crucial pleading for statute of limitations purposes. As we shall explain, the relation-back doctrine says it is.

The relation-back doctrine is typically invoked when the statute of limitations has run between the date the original complaint was filed and the date an amendment is sought. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 6:730, p. 6-180.) If an amended complaint "relates back" to a timely filed original complaint, it escapes the bar of the statute of limitations. (*Ibid.*)

Technically, there is not an amended complaint here, but two complaints: the 2005 and the 2006 complaints. However, under the unusual facts presented here, the 2006 complaint is, for all intents and legal purposes, an amendment to the 2005 complaint: The two pleadings are substantively identical, alleging breach of contract and fraud, the only difference being some added details in the 2006 version. The 2006 complaint was filed four months *before* the 2005 complaint was dismissed

without prejudice for case management purposes. Indeed, for an amended complaint to "relate back" to the original complaint, it must: Be based on the same general set of facts as the original, involve the same injury, and refer to the same incident. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409; *Barrington v. A.H. Robins Co.* (1985) 39 Cal.3d 146, 151.) The 2005 and 2006 complaints surely fit this bill.

At oral argument, defense counsel stressed that the plaintiffs are different on the 2005 and 2006 complaints: respectively, Singh and the Trust. This is a distinction without a difference. As long as the cause of action against a defendant is not factually changed, an amendment to a complaint that substitutes in a plaintiff with standing to sue (i.e., the real party in interest; here, the Trust) is given "relation back" effect after the statute of limitations has expired. (*Cloud v. Northrop Grumman Corp., supra,* 67 Cal.App.4th at pp. 1005-1007 [amendment to substitute plaintiff's trustee in bankruptcy].) Such an amendment "is one of form rather than of substance and in the interests of justice is to be treated as such." (*Id.* at p. 1007.)

Furthermore, "'statutes of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights.'" (*E-Fab*, *supra*, 153 Cal.App.4th at p. 1318.) That cannot be said of the Trust, given the similar 2005 complaint. Nor are defendants prejudiced in any way; they had notice of the substantive factual

allegations in the 2006 complaint when the 2005 complaint was filed.

The 2005 complaint was filed on August 25, 2005; the 2006 complaint substantively mirrors it. If, as defendants maintain, the Trust had inquiry notice on January 14, 2003, the counts alleged in the "relate-back" 2006 complaint for fraud, negligent misrepresentation and (fraud-based) breach of contract are timely under the 2005 complaint.[4]

IV. The Proposed First Amended Complaint

In conjunction with the summary judgment proceeding, the Trust unsuccessfully sought leave to file a first amended complaint. This proposed complaint tracks the allegations of the 2005 and 2006 complaints; adds allegations that for some time prior to the Trust's purchase, the property had been environmentally monitored, and that plaintiffs are now being ordered to pay for its $400,000 cleanup; and simplifies the

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[4] There are three side points to note here: (1) To reiterate, when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort, but not double damages. (*Harris v. Atlantic Richfield Co.*, *supra*, 14 Cal.App.4th at p. 78.) (2) Defendants speciously claim that summary judgment/adjudication should have been granted on the breach of contract claim because the Agreement does not include any agreement to sell the property "'unencumbered by environmental restrictions.'" Defendants are simply being too literal in the fraud-based context presented here of misrepresenting the size of the dump. And, (3) Although the Agreement sold the property "as is," an "as is" provision does not exonerate a seller from fraud; it simply means the buyer accepts the property in the condition visible to him. (*Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 333-334; *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 740-742.)

pleading format to encompass breach of contract, negligent misrepresentation, and fraud only. The proposed amended complaint also deletes any claim concerning the represented area of the property (allegedly, 7.5 acres instead of 7.95 acres). The trial court denied leave to amend in light of its summary judgment ruling. Since we are overturning that ruling, the Trust may file its first amended complaint.

DISPOSITION

The judgment is reversed. The order denying plaintiff (the Trust) leave to file the first amended complaint is reversed. Plaintiff is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.